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IN THE
COURT OF APPEALS OF INDIANA

MARVIN LEE KELLY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A01-0708-CR-405
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael H. Eldred, Judge
Cause No. 84D01-0608-FB-2439

April 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Marvin Lee Kelly was convicted of dealing in cocaine and resisting law enforcement. He argues his admission to police he sold cocaine should not have been admitted at trial, the evidence was insufficient to sustain his conviction, and his sentence was inappropriate.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 1, 2006, a number of plainclothes Terre Haute detectives were at an intersection where residents had complained of drug dealing. They watched as Lonnie Lawson, whom they knew had previously bought cocaine, walked up to Kelly. Kelly was on a motor scooter. Lawson gave Kelly money, and Kelly handed him something. The police believed they had witnessed a drug sale. When the police announced themselves Kelly sped off, but he lost control of his scooter on gravel. Lawson had cocaine in his pocket. Kelly told the police he had sold the cocaine to Lawson.

DISCUSSION AND DECISION

1. Suppression of Confession

Kelly asserts, without citation to authority, his confession should not have been admitted, as it "clearly was not voluntary" because he was in handcuffs and "surrounded by three (3) big, strong Police officers." (Br. of Appellant at 12.) He asserts he "clearly was interrogated," the confession was "clearly not freely and voluntarily given," and was "clearly induced by promises[1] and improper influences." (*Id.* at 13) (footnote added).

[1] Kelly appears to be referring to a police statement that he "would be looking at a lesser charge or possibly no charge at all," (Tr. at 66), if he would cooperate with police and help arrange a transaction

This does not suffice as the cogent argument supported by legal authority our rules require. Ind. Appellate Rule 46(A)(8); *and see, e.g., California Teachers Ass'n. v. Governing Bd. of Rialto Unified School*, 927 P.2d 1175, 1193 (Cal. 1997) ("Simply asserting something is "clear" does not make it so."); *State v. Cooper*, 380 N.W.2d 383, 387 (Wis. Ct. App. 1985) ("Calling a matter 'clear' does not make it so."), *review denied*.

Our review of the admissibility of evidence is essentially the same whether the challenge is made by a pretrial motion to suppress or by a trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), *reh'g denied, trans. denied* 792 N.E.2d 37 (Ind. 2003). We do not reweigh the evidence and we consider conflicting evidence in a light most favorable to the trial court's ruling. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied* 831 N.E.2d 743 (Ind. 2005). When a defendant challenges the admission of his statement, the State must prove beyond a reasonable doubt the defendant voluntarily waived his rights and his confession was given voluntarily. *Miller v. State*, 770 N.E.2d 763, 767 (Ind. 2002). When a defendant makes a voluntariness challenge, the decision to admit the statement is left to the sound discretion of the trial court. *Horan v. State*, 682 N.E.2d 502, 509 (Ind. 1997), *reh'g denied*. A finding of voluntariness will be upheld if the record discloses substantial

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with a suspected drug dealer. The record reflects that promise was not made until after Kelly had confessed. We decline Kelly's invitation to hold a confession can be "induced" by a promise that is not made until after the confession.

Kelly also notes his confession was not written out or recorded in any manner. As he offers no authority to the effect its admissibility depends on such a writing or recording, we are unable to address this allegation of error.

evidence of probative value that supports the trial court's decision. *Kahlenbeck v. State*, 719 N.E.2d 1213, 1216 (Ind. 1999).

The record reflects Kelly's *Miranda* rights were explained to him before he confessed, and Kelly directs us to nothing in the record that suggests his confession was involuntary. We therefore find no abuse of discretion in the admission of Kelly's statement.

2. *Corpus Delicti*

Kelly claims the confession does not permit his conviction because there was insufficient evidence of *corpus delicti* to support it. To support the introduction of a confession into evidence, the *corpus delicti* of the crime must be established by independent evidence of 1) the occurrence of the specific kind of injury and 2) someone's criminal act as the cause of the injury. *Stevens v. State*, 691 N.E.2d 412, 424-25 (Ind. 1997), *reh'g denied, cert. denied* 525 U.S. 1021 (1998). The independent evidence need not be shown beyond a reasonable doubt – it need only provide an inference that a crime was committed. *Id*. at 425. In *Stevens* the body of a murder victim was found underneath a bridge. There appeared to be no real possibility the victim fell and landed directly underneath the bridge. The pathologist who performed the autopsy could not determine the exact cause of death due to the degree of decomposition, but found no injuries that would likely accompany a fatal fall from a bridge.

Our Supreme Court noted there could be plausible non-homicidal explanations for why the victim's body was found where it was, but noted the independent evidence supporting the *corpus delicti* need not preclude every possible explanation of the

circumstances. *Id*. While "[a] dead body alone is not proof of the *corpus delicti* in a homicide case . . . an identified dead body with . . . surrounding circumstances that would indicate the deceased did not die from natural causes establishes *prima facie* that a homicide has been committed and the *corpus delicti*." *Id*. (quoting *Brown v. State*, 239 Ind. 184, 190, 154 N.E.2d 720, 722 (1958), *cert. denied* 361 U.S. 936 (1960)). The surrounding circumstances in that case provided "sufficient inference of criminal agency to satisfy the *corpus delicti* rule." *Id*.

In the case before us there is sufficient independent evidence to "provide an inference a crime was committed." Police watched Lawson hand money to Kelly and Kelly hand something to Lawson. Lawson told the police the object he received from Kelly was in his pocket, and police found cocaine in Lawson's pocket. There was ample evidence to support Kelly's conviction.

3. Appropriateness of Sentence

Kelly was sentenced to sixteen years on Count I, dealing in cocaine as a Class B felony, and one year on Count II, resisting law enforcement as a Class A misdemeanor, to be served concurrently. The advisory sentence for a Class B felony is ten years, with a possible sentence of six to twenty years. Ind. Code § 35-50-2-5.

Even when a trial court acts within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review of the sentence. This appellate authority is implemented through App. R. 7(B), which provides we may revise a sentence authorized by statute if the sentence is "inappropriate in light of the nature of the offense and the character of the offender." We

recognize the special expertise of the trial court in making sentencing decisions. *Barber v. State*, 863 N.E.2d 1199, 1208 (Ind. Ct. App. 2007), *trans. denied* 878 N.E.2d 208 (Ind. 2007). The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

The trial court found Kelly's "significant" criminal history an aggravating circumstance. (Sentencing Tr. at 9). Kelly's presentence report indicated two probation violations and seven misdemeanor convictions including resisting law enforcement, domestic battery, criminal mischief, possession of marijuana, and driving without ever having been licensed. He had a felony conviction of possession of cocaine.

The extent, if any, that a sentence should be enhanced because of the defendant's criminal history turns on the weight of that criminal history, which is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability. *Storey v. State*, 875 N.E.2d 243, 251 (Ind. Ct. App. 2007), *trans. denied*. The remoteness of prior criminal history does not preclude the trial court from considering it as an aggravating circumstance. *Id*. Storey was sentenced for three methamphetamine-related offenses. He had three prior felony convictions, one of which was for the delivery of LSD and other controlled substances, and three misdemeanor convictions, at least one of which involved controlled substances. "Given that much of Storey's criminal history relates to his lifelong drug and substance abuse, the trial court did not abuse its discretion in finding it to be a significant aggravating factor." *Id*.

Kelly's criminal history also includes drug-related offenses, and we decline to find his prior felony conviction of possession of cocaine irrelevant to his current conviction of dealing cocaine just because it occurred seven years ago. His sentence was not inappropriate.

We accordingly affirm.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.